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STAFF REPORT

BOARD MEETING DATE: September 8, 2015

DATE: August 26, 2015
TO: Board of County Commissioners
FROM: Paul A. Lipparelli, Assistant District Attorney

SUBJECT: Action on proposed settlement agreement with Friends of Arrowcreek, LLC relating to the unpaid county utility charges of its predecessor and U.S. Bankruptcy Court Case No. BK-N-14-50087-btb (All Commission Districts)

SUMMARY

The Board of County Commissioners is asked to consider approving a settlement agreement relating to unpaid county utility charges from the prior owner of the Arrowcreek golf courses.

Strategic Objectives supported by this item: Safe Secure and Healthy Communities

PREVIOUS ACTION

None

BACKGROUND

Friends of Arrowcreek, LLC is the owner of The Club at Arrowcreek which consists of 10 parcels with a combined area of approximately 525 acres improved with two 18-hole golf courses, a club house, practice facilities and maintenance buildings. The property is located at 2905 Arrowcreek Parkway in Reno. Friends of Arrowcreek purchased the property from a Chapter 11 Bankruptcy (Case No. BK-N-14-50087-btb) and the purchase was confirmed by the court through the Bankruptcy Plan.

Aspen Sierra Leasing Company was the bankruptcy debtor in Case No. BK-N-14-50087-btb and the predecessor owner of the golf course property. Aspen Sierra Leasing Company encountered business difficulties during the turbulent the economic times and went into bankruptcy. In October of 2014 during the bankruptcy proceedings, Friends of Arrowcreek and the Washoe County Treasurer (in her role as tax collector) entered into a Tax Repayment Agreement providing for the payment of \$1,451,884.44 which was known then to be the pre-petition debt of Aspen Sierra Leasing for utility charges, SAD assessments and property taxes (the "Washoe County Debt"). The Tax Repayment Agreement was approved by the Bankruptcy Court in its Order Confirming Joint First Amended Debtor's Plan of Reorganization (October 1, 2014.) The first payment under the Tax Repayment Agreement in the amount of \$580,773 was made by Friends of

AGENDA ITEM # 12

Arrowcreek and received by Washoe County in October of 2014. Three payments of \$290,376.88 are due on November 2, 2015; November 1, 2016; and November 1, 2017.

Since the conclusion of the bankruptcy Friends of Arrowcreek scrutinized the rights and defenses Aspen Sierra Leasing had regarding the utility payments. Friends of Arrowcreek asserts that it stands in the shoes of Aspen Sierra Leasing which could have challenged the treatment of the reclaimed water charges as collectable as property taxes. This claim is based on the county code definitions in effect at the relevant times. Specifically, Friends of Arrowcreek asserts that because wastewater (reclaimed water) was excluded from the definition of water in the county code at the time Aspen Sierra Leasing's utility bills were delinquent, Washoe County was not authorized under NRS 244.36605(2) to have delinquent charges for "sewerage, storm drainage or water service, or any combination of those services" collected as property taxes. Prior to November of 2014, Washoe County Code 40.160 defined "Water" as "all water, except wastewater, supplied from a public water system to any customer who uses water." That code section was amended, effective November 21, 2014, to change the definition of water to "all water, including wastewater, supplied from a public water system to any customer who uses water." Friends of Arrowcreek asserts it could prevail in a motion to reopen the bankruptcy case to contest Washoe County's claims and the allocations of Aspen Sierra Leasing's previous utility payments. The value of the Aspen Sierra Leasing claims in the bankruptcy exceeded the value of the assets and there was no equity in the property. When the value of claims in bankruptcy exceeds the value of the bankruptcy estate, claims can be disallowed and creditors can receive less than the amount of their claims.

Washoe County asserts that phrase "combination of those services" within the phrase "sewerage, storm drainage or water service, or any combination of those services" in NRS 244.36605(2) contemplates reclaimed water being considered as a combination of water services and sewerage services and the county is authorized to have delinquent charges for any or all of those services collected on the tax roll. The differing assertions constitute a dispute between the Parties. Regardless of how this dispute is resolved, the November, 2014 county code amendment will prevent any similar future claims based on the definition of water.

Friends of Arrowcreek is not seeking to avoid its commitment to the Bankruptcy Court and the County Treasurer to pay the delinquent utility bills of Aspen Sierra Leasing. However, if the portion of the Washoe County Debt attributable to reclaimed water charges is not treated as delinquent property taxes, the penalties and interest that attached to that portion of Aspen Sierra Leasing's property taxes tax bills must be removed which reduces the Washoe County Debt by \$179,195.11. The Washoe County Debt can also be adjusted by crediting \$25,064.48 in utility late fees charged and \$14,241.47 in late fees previously paid by Aspen Sierra Leasing. These three amounts total \$218,501.06. The proposed settlement agreement reduces Friends of Arrowcreek's obligation for the delinquent utility bills of Aspen Sierra Leasing by \$218,501.06.

Litigating the dispute in a reopened bankruptcy case would cause the Parties to incur significant legal expenses and fees. The proposed settlement agreement provides the parties will not sue each other over the dispute.

The reclaimed water used on the Subject Property is a significant portion of Washoe County's reclaimed water supply in the region. Without a financially stable customer operating the Club at Arrowcreek and consuming and paying for reclaimed water, Washoe County would have a significant amount of excess supply. Excess supply could create financial stress for the county's reclaimed water utility because unused reclaimed water cannot be stored indefinitely and the treatment plant continues to produce reclaimed water from county sewer customers.

The Friends of Arrowcreek, LLC is undertaking a capital fundraising effort. If successful, the Friends of Arrowcreek is authorized by this proposed settlement agreement to accelerate the repayment of the principal amount of the utility charges under the Tax Repayment Agreement. The County reclaimed water utility would benefit by getting the previously unpaid utility charges 2 years early and Friends of Arrowcreek would avoid the accumulation of some interest under the Tax Repayment Agreement.

FISCAL IMPACT

Settling the dispute over the property tax treatment of reclaimed water charges will avoid the expenses of litigation and will preserve the obligation of the Friends of Arrowcreek to pay the principal amount of the utility charges. The penalties and interest that attached to that portion of Aspen Sierra Leasing's property taxes tax bills would be removed by this agreement which reduces the Washoe County Debt by \$179,195.11. The Washoe County Debt would also be adjusted by crediting \$25,064.48 in utility late fees charged and \$14,241.47 in late fees previously paid by Aspen Sierra Leasing. These three amounts total \$218,501.06.

RECOMMENDATION

It is recommended the Board of County Commissioners approve the proposed settlement agreement with Friends of Arrowcreek, LLC relating to the unpaid county utility charges of its predecessor and U.S. Bankruptcy Court Case No. BK-N-14-50087-btb

POSSIBLE MOTION

I move to approve It is recommended the Board of County Commissioners approve the proposed settlement agreement with Friends of Arrowcreek, LLC relating to the unpaid county utility charges of its predecessor and U.S. Bankruptcy Court Case No. BK-N-14-50087-btb

Settlement Agreement

This Settlement Agreement (“Agreement”) is made and entered into as of the Effective Date by and among Friends of Arrowcreek, LLC, a Nevada limited liability company (“Friends of Arrowcreek”), and the County of Washoe, a legal subdivision of the State of Nevada (“Washoe County”), who are collectively referred to herein as the “Parties”.

Recitals

1. The real property parcels identified by the Washoe County Assessor for tax year 2013 as APNs 152-021-03, 152-021-06, 152-390-02, 152-390-03, 152-443-22, 152-880-01, 152-582-07, 152-611-07, 152-850-06, 152-471-11 have a combined area of approximately 525 acres and are improved with two 18-hole golf courses, a club house, practice facilities and maintenance buildings (the “Subject Property”). The Subject Property is located in a suburban residential development known as Arrowcreek.

2. Friends of Arrowcreek purchased Subject Property from a Chapter 11 Bankruptcy (Case No. BK-N-14-50087-btb) and the purchase was confirmed by the court through the Bankruptcy Plan. Aspen Sierra Leasing Company was the bankruptcy debtor and predecessor of the Subject Property. The value of the claims in the bankruptcy exceeded the value of the assets and there was no equity in the Subject Property.

3. Washoe County owns and operates the South Truckee Meadows Water Reclamation Facility which produces Class A reclaimed water which is useable for irrigating landscaping and golf courses. Washoe County also operates a sanitary sewer collection system in certain regions of the Truckee Meadows and until December, 2014 also operated a municipal water utility that provided services in a defined service area that included Arrowcreek. The reclaimed water used on the Subject Property is a significant portion of Washoe County’s reclaimed water supply in the region. Without a financially stable customer operating on the Subject Property and consuming reclaimed water Washoe County would have a significant amount of excess supply.

4. Special Assessment District 23 (“SAD 23”) was formed under Chapter 271 of the NRS and Washoe County Bonds were authorized (Washoe County Ordinance No. 1001, adopted November 10, 1997) to provide funds to pay the cost of developing a South Truckee Meadows Water Reclamation Facility reclaimed water delivery system among other improvements in Arrowcreek. Through SAD 23 the infrastructure to deliver reclaimed water to the Subject Property was constructed. Owners of parcels included in SAD 23 pay assessments that retire the debt and pay other expenses of the SAD.

5. Washoe County bills customers for the delivery of water, the delivery of reclaimed water, and for the operation of the sanitary sewer system. At the time of its bankruptcy Aspen Sierra Leasing Company was delinquent in the payment of charges for water, reclaimed water, sewer charges property taxes and special assessment district assessments. Penalties and interest were added to those amounts pursuant to Nevada property tax statutes. Washoe County filed claims in the Aspen Sierra Leasing bankruptcy. When the value of claims in bankruptcy exceed the value of the bankruptcy estate, claims can be disallowed and creditors receive less than the amount of their claims.

6. Pursuant to NRS 244.157 and NRS 318.197(2), and if proper notice is given, unpaid rates, tolls or charges imposed by a county making use of the powers of a general improvement district constitute a perpetual lien on and against the property served. Under NRS 244.36605(2) the board of county commissioners of a county which provides "sewerage, storm drainage or water service, or any combination of those services" may elect by ordinance to have delinquent charges for any or all of those services collected on the tax roll. When delinquent charges for those services are placed on the tax roll, they are subject to the penalties and interest imposed upon delinquent real property taxes.

7. Section 7.5 of Washoe County Ordinance No. 1299 (Reclaimed Water Services Ordinance, May 23, 2006) provides: "Until paid, all rates, tolls, charges and fines provided in this Ordinance constitute a perpetual lien on and against the property served and may be foreclosed upon as provided by law." Section 7.5 of Washoe County Ordinance No. 1344 (Sanitary Sewer Service Ordinance, September 25, 2007) provides: "Until paid, all rates, tolls, charges and fines provided in this Ordinance constitute a perpetual lien on and against the property served and may be foreclosed upon as provided by law." Section 8.5 of Washoe County Ordinance No. 1470 (Water Service Ordinance, August 23, 2011) provides: "Until paid, all rates, tolls, charges and fines provided in this Ordinance constitute a perpetual lien on and against the property served and may be foreclosed upon as provided by law."

8. The Friends of Arrowcreek and the Washoe County Tax Collector (County Treasurer) entered into a Tax Repayment Agreement in October of 2014 providing for the payment of \$1,451,884.44 which is a pre-petition debt of Aspen Leasing for utility charges, SAD assessments and property taxes (the "Washoe County Debt"). The Washoe County Debt was secured by a perpetual lien acknowledged in the Bankruptcy and Washoe County filed Proofs of Claims for the Subject Property. The terms of the Tax Repayment Agreement were approved by the Bankruptcy Court in its Order Confirming Joint First Amended Debtor's Plan of Reorganization (October 1, 2014.) The first payment under the Tax Repayment Agreement in the amount of \$580,773 was made by Friends of Arrowcreek and received by Washoe County in October of 2014. Three payments of \$290,376.88 are due on November 2, 2015; November 1, 2016; and November 1, 2017.

9. Friends of Arrowcreek asserts that it has all the rights and defenses of Aspen Sierra Leasing from the purchase of the assets from the bankruptcy. Friends of Arrowcreek asserts that Aspen Sierra Leasing could have challenged the treatment of the reclaimed water charges as collectable as property taxes because of the county code definitions in effect at the relevant times. Specifically, Friends of Arrowcreek asserts that because wastewater (reclaimed water) was excluded from the definition of water in the county code at the time Aspen Sierra Leasing's utility bills were delinquent, Washoe County was not authorized under NRS 244.36605(2) to have delinquent charges for "sewerage, storm drainage or water service, or any combination of those services" collected as property taxes. Prior to November of 2014, Washoe County Code 40.160 defined "Water" as "all water, except wastewater, supplied from a public water system to any customer who uses water." That code section was amended, effective November 21, 2014, to change the definition of water to "all water, including wastewater, supplied from a public water system to any customer who uses water."

In addition, Friends of Arrowcreek asserts it could seek to reopen the bankruptcy case to contest Washoe County's claims and the allocations of Aspen Sierra Leasing's previous utility payments.

10. Washoe County asserts that phrase "combination of those services" within the phrase "sewerage, storm drainage or water service, or any combination of those services" in NRS 244.36605(2) contemplates reclaimed water being considered as a combination of water services and sewerage services and the county is authorized to have delinquent charges for any or all of those services collected on the tax roll.

11. The difference between Friends of Arrowcreek's assertion and Washoe County assertion over the treatment of delinquent charges for utility services constitutes a dispute between the Parties.

12. If the portion of the Washoe County Debt attributable to reclaimed water charges is not treated as delinquent property taxes, the penalties and interest that attached to that portion of Aspen Sierra Leasing's property tax bills must be removed which reduces the Washoe County Debt by \$179,195.11. The Washoe County Debt can also be adjusted by crediting \$25,064.48 in utility late fees charged and \$14,241.47 in late fees previously paid by Aspen Sierra Leasing. These three amounts total \$218,501.06.

13. Litigating the dispute in a reopened bankruptcy case would cause the Parties to incur significant legal expenses and fees.

In consideration of the mutual conditions, covenants and terms contained in this Agreement including the recitals above, the parties agree:

1. **Definitions.** In addition to the definitions stated in the preceding recitals, the following defined terms, wherever used in this Agreement, shall have the meanings described below:

1.1 "Effective Date" means the date on which this Agreement has been signed by all of the Parties.

1.2 "Friends of Arrowcreek" means Friends of Arrowcreek, LLC, a Nevada limited liability company, and its assigns and successors in interest.

1.3 "Subject Property" is defined in Recital 1, above.

1.4 "Subject Years" means the years the Aspen Sierra Leasing Company's debts were incurred as stated in Washoe County's Proof of Claims, namely those which begin on: July 1, 2010; July 1, 2011; July 1, 2012; July 1, 2013 and July 1, 2014 as tax years under the Nevada property tax laws.

1.5 "Tax Repayment Agreement" is defined in Recital 6, above.

1.6 "Washoe County" means Washoe County, a political subdivision of the State of Nevada, and its elected and appointed officials, officers, managers,

employees, attorneys, contractors, agents, successors in interest, assigns and all other affiliated persons or entities in their personal and official capacities.

1.7 "Washoe County Debt" is defined in Recital 8, above.

2. Compromise.

2.1 Washoe County agrees to reduce the Washoe County Debt by \$218,501.06.

2.2 Friends of Arrowcreek agrees to accept the reduction of the Washoe County Debt by \$218,501.06.

2.3 The Parties acknowledge and agree they have received adequate consideration for this Agreement.

2.4 Friends of Arrowcreek agrees to accelerate the payments due under the Tax Repayment Agreement, reduced by the reduction described in section 2.2 of this Agreement, contingent upon obtaining financing or raising capital. Friends of Arrowcreek will pay Washoe County \$217,536.79, plus accrued interest, on November 2, 2015, representing one third (.33%) of the remaining balance after deducting the reduction of \$218,501.06. Provided the financing contingency described in this section 2.4 is satisfied, Friends of Arrowcreek will pay the remaining balance on or before February 1, 2016. If Friends of Arrowcreek is not able to satisfy the financing contingency, then it will pay the remaining balance, together with interest at the rate of ten percent (10%) per annum in two equal annual installments on November 1, 2016 and November 1, 2017.

3. Future Years. This Agreement resolves the dispute between the Parties concerning the treatment of reclaimed water charges as property taxes for the Subject Property for the Subject Years. Nothing in this Agreement affects the rights of the Parties as to other and future years. The treatment accorded the Subject Property for the Subject Years should not be construed as precedent for how the Subject Property should be treated in future tax years.

4. Bankruptcy Court Approval. The Parties agree to cooperate with each other to obtain the approval of the Bankruptcy Court for the implementation of this Agreement.

5. Covenants Not to Sue.

5.1 Washoe County agrees and covenants on behalf of itself and its elected and appointed officials, officers, employees, attorneys, contractors, agents, managers, successors in interest, assigns and all other affiliated persons or entities in their personal and official capacities that neither it nor they will commence any legal action, or otherwise assert any claims or demands, against Friends of Arrowcreek or its members, officers, employees, attorneys, contractors, agents, managers, successors in interest, assigns, and all other affiliated entities or persons in their personal and official capacities which relate to the treatment of the reclaimed water charges as a property tax debt.

5.2 Subject to the reservations set forth above, Friends of Arrowcreek agrees and covenants on behalf of itself and its members, officers, employees, attorneys, contractors, agents, managers, successors in interest, assigns and all other affiliated persons or entities in their personal and official capacities that neither it nor they will commence any legal action, or otherwise assert any claims or demands, against Washoe County or its officers, employees, attorneys, contractors, agents, managers, successors in interest, assigns, and all other affiliated entities or persons in their personal and official capacities which relate to the treatment of the reclaimed water charges as a property tax debt.

5.3 The Parties reserve their rights in the event of a dispute over the interpretation or enforcement of this Agreement and those rights are not waived by this section.

6. Tax Repayment Agreement. Each provision of the Tax Repayment Agreement remains in effect unless expressly amended or unless in direct conflict with the terms of this Agreement.

7. Representations and Warranties. Each party represents and warrants for itself as follows:

7.1 Such party has the full authority and power to enter into this Agreement and to consummate the transactions contemplated under this Agreement.

7.2 The execution, delivery and consummation by such party of the transactions contemplated under this Agreement will not result in the breach of any term or provision of, or constitute a default under, any applicable law or regulation or under any other agreement or instrument to which such party is a party or by which it is bound.

8. No Admission of Liability. This Agreement is made to compromise, settle, terminate and to constitute an accord in satisfaction of the claims released by the Parties in accordance with this Agreement. The Parties admit no fault, liability or wrongdoing of any nature or any kind whatsoever and expressly deny and disclaim any fault, liability or wrongdoing alleged, or which could have been alleged.

9. Voluntary Agreement. Each of the Parties represents and warrants for itself that it has read this Agreement and understands its contents, and that this Agreement is executed voluntarily with full knowledge of the consequences and implications of the obligations and rights of the other party in this Agreement. Each party represents and warrants for itself that it has had an opportunity to review this Agreement and to be represented by independent counsel of its choice during the negotiations which preceded execution of this Agreement and in connection with the preparation and execution of this Agreement.

10. Governing Law. The terms and conditions of this Agreement shall be construed and enforced in accordance with the laws of the State of Nevada.

11. Sole Agreement and Modification. Except as otherwise expressly provided in the Tax Repayment Agreement, this Agreement is intended to be the full and final expression and complete and exclusive statement of all of the terms of the understanding between the

Parties for their compromise and settlement of the claims of the Parties. This Agreement may not be amended or modified except by a written instrument executed by each of the Parties.

12. Binding Effect. This Agreement shall inure to the benefit of and be binding on each of the Parties, their members, officers, employees, attorneys, contractors, agents, trustees, intended beneficiaries, managers, elected and appointed officials, successors in interest, assigns, all other affiliated persons or entities in their personal and official capacities and each party shall have the right to enforce this Agreement in accordance with its terms.

13. No Unintended Third-Party Beneficiaries. Except as otherwise set forth herein, nothing in this Agreement shall be construed to benefit any non-party or third party. The Parties to this Agreement agree that no non-party or third-party shall be considered or construed to be a beneficiary or third-party beneficiary of this Agreement except as otherwise set forth herein.

14. Severability. If any part, term or provision of this Agreement is held by a court of competent jurisdiction to be illegal or in conflict with any law of the United States or any state, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Agreement did not contain the particular part, term or provision held to be invalid.

15. Construction. This Agreement shall be interpreted as if prepared by the Parties equally, and shall not be construed against or in favor of any one party or group of Parties.

16. Costs and Attorneys' Fees. Except as expressly provided in this Agreement, each party shall pay and be responsible for any attorney's fees or costs incurred by such party arising from or relating to the disputes among the Parties which have been compromised and settled in accordance with this Agreement.

17. Further Assurances. The Parties covenant and agree that each of them will perform such other acts and provide such other assurances as are reasonably required to implement the intentions of the Parties as stated in this Agreement.

18. Notices. Any notices required or authorized to be given by this Agreement shall be in written form. Any notices required or authorized to be given by this Agreement may be sent by registered or certified delivery, postage prepaid and return receipt requested, addressed to the proper party at the following address or such address as the party shall have designated to the other Parties in accordance with this Section:

For Washoe County:

Washoe County
Director of Community Services Department
1001 E. Ninth Street
Reno, Nevada 89520

For Friends of Arrowcreek:

Friends of Arrowcreek, LLC
5920 Sky Terrace Ct.
Reno, Nevada 89511

Any notice required or authorized to be given by this Agreement shall be deemed to have been sufficiently given or served in written form if mailed as provided herein,

personally delivered to the proper party, or sent by facsimile and actually received by the addressee. Such notice shall be effective on the date of receipt by the addressee party.

19. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which shall constitute the same Agreement.

The Parties have executed this Agreement on the dates indicated below.

Friends of Arrowcreek, LLC

By: _____

GARY _____ its Manager
W PESTELLO

Date: AUG 12, 2015

By: _____
THOMAS GUNZ its Manager

Date: Aug 12, 2015

The County of Washoe

Attest:

By: _____

Marsha Berkbigler
Chairman County Commission

Washoe County Clerk

Date: _____

Date: _____